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NO:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN LUCILLE,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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80 pp

EDITOR'S NOTE

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QUESTIONS PRESENTED

Whether the Seventh Circuit Court of Appeals erred in wielding a fraudulent judgment order in its opinion and at oral argument in derogation of the settlement agreement when it was notified that the judgment order was prepared to the Petitioner, **JOHN LUCILLE's ["LUCILLE's"]** detriment by his **former** attorney without the LUCILLE's knowledge or approval, where this fraud and other earlier fraud were clearly mentioned in LUCILLE's Petition for Rehearing, filed pro se.

Whether the Seventh Circuit Court of Appeals erred in extending *Kokkonen* by holding that it and the district court lacked jurisdiction to enforce the terms of the settlement agreement, that went into more detail than the judgment order (which did not explicitly

retain jurisdiction), where judgment is actually entered against Respondent, **CITY OF CHICAGO** ["CITY"], as opposed to the case merely being dismissed pursuant to settlement, and where the district court has a separate continuing jurisdiction to enforce the Shakman decree.

Whether the majority and concurring opinions of the Seventh Circuit erred in summarily rejecting the notion that the parties could not have intended that the term reinstatement to mean that LUCILLE was to be put back in the position he would have been just prior to discharge with regard to leave and pension credits, if not as if he had never been fired.

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JOHN LUCILLE,

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CITY OF CHICAGO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, John Lucille, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above proceeding on August 3, 1994, and the September 22, 1994 denial of his

Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 31 F.3d 546, and is reprinted with that Court's judgment in the appendix hereto, pp.1-7, *infra*. The memorandum opinion of the district court denying the petitioner's Amended Petition to Enforce (1993 U.S. Dist. 188686 (N.D. Ill.)) is reprinted in the appendix, pp. 21-37, *infra*.

JURISDICTIONAL STATEMENT

The District Court derived jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343(a)(3), and its inherent authority to enforce and interpret its judgments. The Seventh Circuit Court of Appeals derived

its jurisdiction pursuant to 28 U.S.C. Section 1291, and this Court of last resort derives jurisdiction pursuant to 28 U.S.C. Section 1254(1) to review and entertain this Petition for Certiorari filed (by mailing) within ninety days of the September 22, 1994 order of the Seventh Circuit denying the Petitioner's August 15, 1994 Petition for Rehearing.

STATEMENT OF THE CASE

The Petitioner, **JOHN LUCILLE ["LUCILLE"]**, was employed by the Respondent, **CITY OF CHICAGO ["CITY"]**, in the early 1960's as a laborer in the Department of Sewers. In the 1970's LUCILLE was elevated to the position of Assistant Foreman of Cleaning in the Department. In 1980 LUCILLE became the first black dis-

trict foreman of cleaning in the Department of Sewers. Throughout his employment LUCILLE was listed as a discretionary employee and unlike a few of his fellow employees he did not have career service status from the CITY's point of view. Even the vast majority of the laborers served at the whim of the commissioner, Edward Quigley, the mayor, and their service to the regular Democratic organization. The CITY consented to the entry of the *Shakman Decree*, 481 F. Supp. 1315, 1356-59, where said proceedings had been instituted to combat the patronage system entrenched in the City.

In 1983 LUCILLE did not support Harold Washington in the mayoral primary, but rather supported Jane Byrne, consistent with the regular Democratic Organization in his West-side neighborhood. After

Harold Washington was elected, in 1984, as part of an appropriations ordinance, a six-month one-time city-wide probation was offered thousands of discretionary employees. If they were not discharged during this probation they became career-service employees entitled to a pre-termination hearing.

Toward the end of this probation LUCILLE and from between 300 to 600 other employees were discharged. Much litigation followed. There is some doubt whether these employees were discharged prior to the end of the probation what with the CITY's practice of giving discharged employees their accumulated vacation time and the fact that that practice was not observed for most of these employees. Further there is some doubt whether the ordinance was finally passed prior to the

start of the probation, and the employees were not informed of the January 1, 1984 beginning of the probation until January 10, 1984 after it started. Further, the terms and criteria for evaluating probationer, as set out in the January 10, 1984 letter, was not followed, and probably was changed from time to time without informing the employees. And lastly LUCILLE, a supervisor, was at a meeting where the then Commissioner of the department stated that if the supervisors wanted to keep their jobs they better get out and write-up their subordinates because the CITY was not going no 800 department employees to make career service.

This proceeding was initiated in 1985 as an enforcement and contempt proceeding under the *Shakman Consent Decree* by the filing of a Petition for Rule to

Show Cause as the initial pleading rather than a complaint at law. After LUCILLE started to proceed pro se, and made allegations of fraud with regard to how the CITY conducted this probation and how it conducted itself in the federal court, LUCILLE's claim under the Shakman Decree was settled on the eve of trial pursuant to a settlement agreement. LUCILLE was to receive reinstatement as a foreman, with seniority back to 1980 when he made foreman, and $21,000 cash.

Unbeknownst to him, his former attorney, Steven Sosman, who was still representing two co-Plaintiffs, prepared and submitted a judgment order, app. p. , that entered judgment against the CITY for $21,000, $4,000 more for Sosman's prior work, plus reinstatement as a career service employee, which the Judge John

Nordberg signed. The judgment order which mentioned the term reinstatement but left out the retroactive seniority language. The judgment order also did not have any release language in it. The judgment order states that it is entered in accordance with the settlement agreement signed by the parties, but contains no other language expressly reserving jurisdiction to enforce the settlement agreement that was to resolve LUCILLE's claims under the Shakman Decree.

The District Court and the parties assumed that the District Court had the power to enforce and interpret the settlement agreement in this Shakman matter. LUCILLE stated that prior to interpreting the release language in the settlement agreement the district Judge Nordberg needed to determine what rein-

statement entailed and that LUCILLE should at least to brought back to the point he had been just prior to discharge, as well as given the time that would have accumulated to him had he not been discharged. LUCILLE made similar claims for pension credits. LUCILLE cited to the courts below another closely related case involving another CITY Sewer Department worker discharged after the same 1984 city-wide probation, and where the CITY was represented by the same assistant corporation counsel, Mary L. Smith, Judge Norgle initially concluded that Busa was clearly entitled to immediately use the vacation time he had accumulated prior to his discharge, after noting that said assistant corporation counsel conceded that Busa was entitled to the time. And upon reconsideration on the CITY's motion which

cites the release language in an essentially identical settlement agreement, Judge Norgle decided that what the parties meant was ambiguous and set the matter down for an evidentiary hearing. Prior to the trial thereon the CITY and Busa settled their dispute. In light of an initial holding and definition of reinstatement with regards to accumulated vacation time by Judge Norgle in *Busa v. Barnes,* 84 C 6525 decided by Judge Norgle, LUCILLE, and his counsel, focused on the time and pension benefits he had accumulated just prior to his 1984 discharge.

LUCILLE also brought out in his initial and amended Petitions to Enforce the Settlement Agreement that during the settlement negotiations after LUCILLE was pro se, the CITY attorney sent him a letter summarizing the parties positions,

both of which mentioned reinstatement with full seniority and benefits, and that the "and benefits" language was left out of the settlement agreement without negotiation and without LUCILLE knowledge. This LUCILLE claimed was trickery by an attorney in a case and a fraud upon him and the court.

As a fall back position, consistent with Judge Norgle's later ruling that a nearly identical settlement agreement in *Busa v. Barnes,* 84 C 6525, was ambiguous, LUCILLE asserted that he was entitled to an evidentiary hearing to determine the parties' intent as to the term reinstatement, and its impact on accrued time as set forth in an ambiguous settlement agreement, to the extent that they had discussed it at all, as well as regarding the CITY's removal of the term "and bene-

fits" from the negotiation without discussion. LUCILLE also claimed that as to matters not litigated or discussed, the release language, however broad, did not apply.

The district court instead adopted the CITY's position that the settlement agreement was not ambiguous and that the release language was controlling and in a memorandum opinion, set out in the appendix, pp. 21-37, denied LUCILLE's Amended Petition to Enforce without any kind of evidentiary inquiry. Judge Nordberg did not address LUCILLE's claim that he was tricked by opposing counsel, or that the release language did not apply as to claims not litigated or discussed. Judge Nordberg did, however, make clear in his opinion that LUCILLE was seeking both the time and pension credits he had accu-

mulated previous to his discharge as well as the time he would have accumulated but for his discharge. LUCILLE appealed to the Seventh Circuit, 94-1106.

LUCILLE, and his counsel on appeal, never knew about the judgment order prepared by the attorney he had previously fired, Steven Sosman, and its differences from the settlement agreement, until oral argument, well after the briefs had been filed. Only then did it become apparent that such a document had been prepared and submitted by Sosman, and signed by Judge Nordberg. Judge Easterbrook focused on these differences, and the lack of clear language in the judgment indicating that the district court intended to retain jurisdiction. LUCILLE's counsel on appeal clearly told the appellate panel on rebuttal that Sosman was not

LUCILLE's attorney at the time he prepared and submitted the judgment order. This important information was ignored by the appellate court, as is clear from the "facts" its sets out in its August 3, 1994 opinion (app. pp. 1-16), per Judge Easterbrook, which affirmed the district court's denial of LUCILLE's petition. On Monday, August 15, 1994 LUCILLE clearly mentioned in his Petition for Rehearing, prepared pro se, that he had fired Sosman prior to the submission and entry of the judgment order and did not know about it. LUCILLE's Petition for Rehearing was denied on September 22, 1994, app. pp. 19-20.

REASONS FOR GRANTING CERTIORARI

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN WIELDING A FRAUDULENT JUDGMENT ORDER IN ITS OPINION AND AT ORAL ARGUMENT IN DEROGATION OF THE SETTLEMENT AGREEMENT WHEN IT WAS NOTIFIED THAT THE JUDGMENT ORDER WAS PREPARED TO THE PETITIONER, JOHN LUCILLE'S ["LUCILLE'S"] DETRIMENT BY HIS FORMER ATTORNEY WITHOUT THE LUCILLE'S KNOWLEDGE OR APPROVAL, WHERE THIS FRAUD AND OTHER EARLIER FRAUD WERE CLEARLY MENTIONED IN LUCILLE'S PETITION FOR REHEARING, FILED PRO SE.

LUCILLE, through appellate counsel, unequivocally stated that Sosman had been previously fired by LUCILLE, and that he was pro se at the time that the judgment order was submitted by Sosman and

signed by the District Court. Sosman never came back on as LUCILLE's attorney, as confirmed by the entries in the docket sheets. Sosman submitting a judgment order that the trial court signed without LUCILLE's knowledge and consent and which failed to expressly retain jurisdiction or to contain important terms of the settlement agreement (such as reinstatement **retroactive seniority back to 1980**), was a fraud upon the court and upon LUCILLE. In the recent Illinois case of *Eckel v. Bynum* (1st App. Dist. 1992), 240 Ill.App.3d 867, 608 N.E.2d 167, 178 the court remanded the case for an evidentiary hearing as to the defendant's purported attorney's actual authority with instructions stating that if said attorney was in fact authorized to represent her then the judgment of foreclosure entered against her interest in

certain realty was **void** [emphasis added]. Here there is not even apparent authority on the part of Sosman, who was later disbarred for other reasons, inasmuch as Judge Nordberg had previously given Sosman leave to withdraw at LUCILLE's request.

Sosman had a vested interest in having the judgment order improperly entered in that it formally entered judgment against the CITY for $4,000 in attorney's fees for his prior representation of LUCILLE. The judgment is in fact void, and can be attacked directly or collaterally in any court, even this one.

In addition to stating at oral argument that Sosman was in fact not LUCILLE's attorney at the time he submitted the judgment order, (AP. 39) the fact that the judgment order was improperly submitted by LUCILLE's **former** attorney was

a part of his Petition for Rehearing. The Seventh Circuit turned a completely deaf ear to the point of seriously misstating the facts in its opinion by failing to address the obvious issue of fraud, which the Seventh Circuit first made an issue of at oral argument by focusing on the differences between the improperly entered judgment order and the settlement agreement, and by refusing to enforce and interpret the latter.

The trial court and the Seventh Circuit erred in failing to address these issues of fraud (including the assertion by LUCILLE that Mary Smith tricked him by taking out "and benefits"), and in failing to afford LUCILLE an evidentiary hearing to get to the bottom of his claims of fraud.

Fraud perpetrated by an attor-

ney, as an officer of the court, is fraud upon the Court. *Williams v. Board of Regents* (M.D.Ga. 1981), 90 F.R.D. 140, 143. The judgment order is in fact void and for the Seventh Circuit to rely upon it when put on notice of the facts showing that it was improperly entered by LUCILLE's **former** attorney is egregious and clear reversible error. Clearly in this case the judgment order reaches to the very core of the court as an institution of justice. *See, Rockdale Management Co. v. Shamut Bank, N.A.* (Mass. 1994), 418 Mass. 596, 638 N.E.2d 29, 31, and *Skelly Oil v. Universal Oil* (1st App. Dist. 1949), 338 Ill.App. 79, 86 N.E.2d 875, *both citing Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944), 322 U.S. 238, 246, 88 L.Ed. 1250, 64 S.Ct. 997, 1001.

LUCILLE has consistently main-

tained since November 24, 1989, R82 & R83 that the CITY has engaged in a continuing fraud upon the court in contending during various cases that the criteria for implementing the six-month Probation (from Jan. 1, 1984 through June 30, 1984) as to all the old then discretionary employees citywide was supposedly controlled by a May 3, 1984 memorandum from the director of personnel which LUCILLE, as a district foreman, contends was never sent out, and was certainly not sent out to the employees subject to the probation. LUCILLE has consistently maintained that the CITY's conduct in all these cases emanating from the mass 1984 firing has be effected by fraud.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN EXTENDING AND MISINTERPRETING *KOKKONEN* IN HOLDING THAT IT AND THE DISTRICT COURT LACKED JURISDICTION TO ENFORCE THE TERMS OF THE SETTLEMENT AGREEMENT, THAT WENT INTO MORE DETAIL THAN THE JUDGMENT ORDER (WHICH DID NOT EXPLICITLY RETAIN JURISDICTION), WHERE JUDGMENT IS ACTUALLY ENTERED AGAINST THE RESPONDENT AS OPPOSED TO THE CASE MERELY BEING DISMISSED PURSUANT TO SETTLEMENT, AND WHERE THE DISTRICT COURT HAS A SEPARATE CONTINUING BASIS FOR JURISDICTION IN ENFORCING THE SHAKMAN DECREE.

At oral argument Judge Easterbrook brings up the recent decision of *Kokonnen v. Guardian Life Ins. Co.* (1994), ---U.S.----,---- - --, 114 S.Ct. 1673, 1675-76, 128 L.Ed.2d 391. At that time LUCILLE's attorney stated that he did

not think that it was controlling because here a judgment was entered against the CITY and because there is continuing jurisdiction to enforce the Shakman Decree. Judge Easterbrook then states that LUCILLE does not wish to enforce the decree, but rather his settlement agreement. But, for the purposes of jurisdiction, if the district court could *sua sponte* declare what reinstatement entailed for all employees, pursuant to its continuing jurisdiction to enforce and interpret the decree, it has to have jurisdiction to make a determination as to LUCILLE.

Neither the majority nor concurring opinions recognize that neither *McCall-Bey*, 777 F.2d 1178, nor *Kokkonen* have any applicability where **judgment** is entered against the defendant CITY. Both case involved the dismissal (rather than

the completion) of a case pursuant to a settlement. A federal district court has inherent ancillary jurisdiction to enforce, interpret, protect, or give effect to its judgments and decrees, including those entered by consent. *Hook v. Ariz. Dept. of Corr.* (9th Cir. 1992), 972 F.2d 1012, 1014. Enforcing or protecting federal court judgments are sufficiently related to the original action for the district court to have ancillary jurisdiction over said claims. *Hankins v. Finnel* (8th Cir. 1992), 964 F.2d 853, 859-60; *Sullivan v. Hochfelder* (N.D.Ill. 1993), 834 F.Supp. 1036, 1037-38. Whereas enforcing or interpreting a settlement agreement after the case is dismissed pursuant thereto, and where the dismissal order does not reserve jurisdiction, has been held to be a wholly independent

action not sufficiently related to the prior case to give the district court jurisdiction over the later controversy. *Kokkonen* 114 S.Ct. 1673, 1675-76, 128 L.Ed.2d 391; *United Steelworkers v. Libby, McNiell & Libby* (7th Cir. 1990), 895 F.2d 421, 423.

The majority opinion even quotes the settlement agreement that it refuses to enforce or interpret. Where there are substantial and improper omissions in the judgment order as compared to the settlement agreement, for the Seventh Circuit to enforce and/or interpret the former but not the latter, works a great injustice, and makes a mockery of the parties' intent, as more thoroughly spelled out in the settlement agreement, even if that is ambiguous. Such a resolution simply fails to render complete justice. Its interpre-

tation of the meaning of the judgment order is probably res judicata. Now, even if a state court in a breach of contract action might agree with LUCILLE as to the meaning of the settlement agreement as applied to leave and pension credits, it would probably seriously hesitate if its opinion would conflict with the federal appellate court's interpretation of the judgment order alone on those points.

The concurring opinion states that the language in the judgment order "entered in accordance with the settlement agreement," is almost identical to the language in *McCall-Bey*, 777 F.2d 1178, 1188-90 (7th Cir. 1985) which was deemed barely sufficient to bring into play the district court's ancillary jurisdiction. LUCILLE submits that the concurring judge was correct in concluding that the settle-

ment agreement was sufficiently incorporated into the judgment order. However, since judgment was actually entered against the CITY (as opposed to merely a dismissal of the suit) such incorporation should not be required.

Here, an independent basis of jurisdiction resides in the district court in that it has continuing jurisdiction to enforce the *Shakman Consent Decree,* 481 F.Supp. 1315, 1356-59. Before LUCILLE brought his claim under the Shakman decree to the district court's attention initially, via a Petition for Rule to Show Cause (rather than a complaint at law), and after LUCILLE was reinstated to his position with the CITY, there was continuing jurisdiction to enforce the Shakman decree. It should not be said that the district court lacked the **jurisdiction** to

entertain LUCILLE's Amended Petition to Enforce.

For the appellate court to condition LUCILLE's ability to enforce and interpret the judgment order and settlement agreement as to the meaning of the term reinstatement upon the repayment of the $21,000 he received (and the $4,000 his former attorney received) ignores the fact that the case was never dismissed pursuant to settlement and that there is continuing jurisdiction to enforce the *Shakman Consent Decree* emanating from the original Shakman case.

The Seventh Circuit erred in determining that the district court had no jurisdiction to enforce or interpret the settlement agreement in what had always been a Shakman decree enforcement case where the CITY agreed to have judgment

entered against it (rather than the case being dismissed pursuant to settlement).

From the facts in said Amended Petition it is sufficiently unclear when the CITY finally deprived LUCILLE of his leave and/or pension credits (perhaps well after his reinstatement) to probably state a new Shakman violation. This is a further basis of jurisdiction premised upon the district court's continuing jurisdiction to police the Shakman Consent Decree.

THE MAJORITY AND CONCURRING OPINIONS OF THE SEVENTH CIRCUIT ERRED IN SUMMARILY REJECTING THE NOTION THAT THE PARTIES COULD NOT HAVE INTENDED THE TERM REINSTATEMENT TO MEAN THAT LUCILLE WAS TO BE PUT BACK IN THE POSITION HE WOULD HAVE BEEN JUST PRIOR TO DISCHARGE WITH REGARD TO LEAVE AND PENSION CREDITS, IF NOT AS IF HE HAD NEVER BEEN FIRED.

For the Seventh Circuit majority opinion to state that "most lawyers use reinstatement..." does not shed any light on what the **parties** meant by the term in this case, where LUCILLE was pro se and where the judgment order was most improperly prepared by his former attorney. In fact Judge Norgle's contrary initial conclusions in a very similar circumstance in *Busa v. Barnes,* 84 C 6525 (N.D.Ill. 1990) is much more telling. The term reinstatement in this case should mean at a minimum that upon his reinstatement LUCILLE is restored the accumulated time off and pension credits that he had either at the time of his discharge, or at the time he made district foreman since he is being reinstated with retroactive seniority back to that time.

Even if one is just to look at

the judgment order (Ap. 39) as an initial matter, what effect the term reinstatement with career service has on LUCILLE's claim that it included the restoration of his accumulated time off and pension credits is sufficiently unclear for the settlement agreement to also be considered. Both the documents, including their differences, are sufficiently unclear that both the trial and appellate courts erred in denying LUCILLE a hearing on the matter.

The Seventh Circuit's concurring opinion failed to consider that LUCILLE might well be entitled to the restoration of the accumulated time off and pension credits (at least to those contributed by the CITY) that he had at the time of his discharge, even if the term reinstatement cannot, under the circumstances, be fairly interpreted as meaning that LUCILLE is

entitled to the restoration of these things as if he had never been discharged at all.

Reinstatement with seniority back to 1980 (well prior to the 1984 firing), as set out in the settlement agreement, either clearly means that LUCILLE is entitled to the paid time off and other benefits that he had accumulated up until that time, or the settlement agreement is ambiguous given the release language it also contains. If the latter is the case, LUCILLE is entitled to a hearing to determine the parties' meaning and intent. When determining the parties' intent it is worth noting that in the *Busa* case the same assistant corporation counsel that settled LUCILLE's case did not contest that Busa was entitled to the vacation time he had accumulated at the

time of his discharge,

Both the majority and concurring opinions state that LUCILLE took the position that the term reinstatement meant that he was entitled to leave and pension credits as if he had never been discharged. The district court's opinion makes clear that LUCILLE first asked to have the time and pension credits restored to him that he had accumulated just prior to his discharge, see App. page. 32. LUCILLE stated this at oral argument as well.

Even the concurring opinion fails to address the question of further question of the accumulated time off and pension credits LUCILLE had had **at the time of his discharge.** Just because a court concludes that the $21,000 settlement precludes LUCILLE from laying claim

to time off and pension credits that he would have accumulated **during the period of his discharge**, that does not mean that the same payment also forecloses the restoration of accumulated time off and pension benefits that LUCILLE had had **at the time of his discharge**, given that he is being reinstated to his position with retroactive seniority pursuant to the same settlement.

Neither the concurrence nor the majority recognizes this distinction previously made to them by LUCILLE in reaching their summary conclusions and neither one comes to grips with Judge Norgle's considered conclusions on almost identical facts.

The trial court and the Seventh Circuit erred in deciding that the term reinstatement was so clear that LUCILLE

was not entitled to an evidentiary hearing regarding whether he was entitled to use the time off he had accumulated prior to his 1984 discharge.

The trial court erred in concluding that the release language was controlling without allowing LUCILLE to show (1) that the issue of what to do about time off that LUCILLE had accumulated prior to his discharge was not actually litigated or discussed in settling the case, (2) that Mary Smith left the term "and benefits" out of the settlement agreement without any negotiation, and (3) that LUCILLE was not finally deprived of his accumulated time off until after his reinstatement. The release language cannot serve to bar a claim that has not even arisen at the time.

LUCILLE, who was pro se when he

settled his case, should have been allowed to show in the district court in that Mary Smith tricked him in leaving out the words "and benefits" from the settlement agreement, and that that misconduct by an attorney, along with the preparation of a improper judgment order by LUCILLE's **former** attorney, which omitted certain additional crucial terms, constituted fraud upon the court. *Williams v. Board of Regents* (M.D.Ga. 1981), 90 F.R.D. 140, 143.

Where an issue is not actually litigated or discussed, ie. what to do about the accumulated time off and pension benefits that LUCILLE had at the time of his discharge, as contrasted with his salary and vacation time during the period of his discharge for which LUCILLE received $21,000, even broad release lan-

guage does not bar a subsequent claim. *Devil's Lake Sioux Tribe v. State of N.D.* (8th Cir. 1990), 917 F.2d 1049; *Mercury Cleaning Systems Inc. v. Manitowac Eng. Corp.* (7th Cir. 1958) 255 F.2d 318. The trial court erred in concluding without an evidentiary inquiry that the release language in the settlement agreement barred LUCILLE's claims, and the Seventh Circuit erred in not reversing the district court.

That is particularly true if the CITY could have given LUCILLE his accumulated time off back after his reinstatement, but chose not to for political reasons. The trial court erred in stating that the pleadings and supporting briefs failed to state a new Shakman violation, and the Seventh Circuit erred in not reversing the trial court.

CONCLUSION

For the foregoing reasons, particularly fraud upon the trial and appellate courts, this Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 94-1106

JOHN LUCILLE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No 85 C 5956 - Judge John A. Nordberg, Judge.

Argued July 7, 1984--Decided August 3, 1994

Before CUDAHY, FLAUM, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

App. 2

In 1985 John Lucille sought to have the City of Chicago held in contempt of court for violating the consent decree in *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315 (N.D. Ill. 1979), by considering his politics when deciding to discharge him from employment. In December 1989 the parties settled their differences. The City agreed to reinstate Lucille and pay $25,000 ($21,000) for Lucille and $4,000 for his lawyer. The district court entered a judgment, drafted by Lucille's lawyer, containing some but not all of the terms of the settlement agreement. Four years later Lucille filed a petition to "enforce" the settlement agreement--not the judgment, but the contract between the parties.

Lucille contended that the City should bate awarded him vacation, holiday, and sick pay that would have accrued by 1990 (when he was reinstated) had he been employed continuously, and that the City owed him $58,000 to top up his pension benefits ($48,000 to replace funds Lucille withdrew when he was, plus $10,000 to facilitate early retirement). The district court concluded that the settlement agreement does not support Lucille and denied the petition. 1993 U.S. Dist. LEXIS 188686 (N.D. Ill.).

Although *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985), held that a district court may not enforce a settlement agreement unless there is an independent basis of federal jurisdiction,

the district judge did not discuss this initial hurdle. Lucille and the City are not of diverse citizenship. *McCall-Bey* disposes of the contention that just because the initial suit sought to vindicate a federal right, the court possesses federal-question jurisdiction under 28 U.S.C. Sec. 1331 to construe and enforce a contract ending the litigation. *Cf. Morgan v. South Bend Community School Corp.*, 797 F.2d 471 (7th Cir 1986). Since the parties exchanged briefs on the appeal, the Supreme Court has agreed with McCall-Bey that federal courts lack "inherent" power to enforce settlements of federal litigation, explaining that "[e]nforcement of [a] settlement agreement . . . is more than just a continuation or

renewal of the dismissed suit, and hence requires its own basis of jurisdiction." *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673, 1675-76 (1994)

The Shakman consent decree rests on 28 U.S.C. Sec. 1343(a)(3), which grants jurisdiction to enforce the civil rights laws. *Kokkonen* held open the possibility that a party aggrieved by a breach of a settlement agreement could seek to annul the settlement and reactivate the original case, with its jurisdictional footing intact. 114 S. Ct. at 1675. Lucille does not want to start anew, however. Rescission would require him to tender at least the $25,000, which he has not offered to do. *See Fleming v. United States Postal Service*, No. 92-2735 (7th Cir. June 16,

1994). He has no desire to surrender the benefits of the settlement and prove in 1994 that his discharge in 1984 rested on criteria forbidden by the first amendment; he wants to enforce the 1989 contract, not the Shakman decree.

What about ancillary jurisdiction? *Kokkonen* eliminates any contention that enforcing a settlement of federal litigation automatically comes within the ancillary jurisdiction. "No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court." 114 S.Ct. at 1675-76. The Justices observed, however, that a federal

court has ancillary jurisdiction to protect and enforce its judgments. Thus if the judgment explicitly incorporates the terms of the settlement, or reserves authority to enforce the settlement, the court possesses ancillary jurisdiction. Id. at 1677. We concluded in *McCall-Bey* that the court also possesses jurisdiction if the judgment implicitly incorporates the terms of a settlement that itself provides for continuing jurisdiction. 777 F.2d at 1188-89. But the district court's judgment in this case does not incorporate the settlement or reserve power to enforce the parties' agreement. Instead it sets out the principal terms, directing Chicago to pay $25,000 and reinstate Lucille. Having put some but not all of the terms

in the judgment, the district court has identified which it will enforce and which it will not. Violation of terms which are not in the judgment cannot be thought to flout the court's order or imperil the court's authority, and claims of such violations therefore do not activate the ancillary jurisdiction of the court. And although the judgment recognizes the parties' settlement, this case differs from *McCall-Bey* because neither the judgment nor the settlement so recognized reserves jurisdiction to enforce the terms of the settlement.

Lucille relies on a provision in the settlement agreement requiring reinstatement with "seniority . . . retroactive to July 16, 1980," which he be-

lieves entails an entitlement to extra leave credits and contribution of pension funds sufficient to permit him to take early retirement as if he had been at work during the intervening years. Chicago relies on a clause extinguishing "All claims for salary, accumulation of vacation days, sick days and other benefits of employment" to which Lucille would have been entitled had he been continuously employed. Neither of these provisions made it into the judgment. Terms amounting to a release may be enforced in federal court as a defense, if the dispute is within federal jurisdiction, but a release does not create that jurisdiction. Doubtless the contract provides a context for interpretation of the judgment. Ambigu-

ities in the court's order should be resolved consistently with the more detailed provisions of the parties' bargain. But Lucille does not contend that any terms of the judgment is ambiguous--indeed Lucille's brief does not mention the judgment.

The only potential ambiguity we could find is in the judgment's closing words: "John Lucille shall be further afforded career service up upon reinstatement to that position." Does "career service" entail retroactive leave and pension credits? At oral argument Lucille's lawyer said that is does not, and the settlement agreement confirms this understanding. Paragraph B of the settlement reads:

> On or before January 16, 1990, the City shall reinstate Plaintiff to the position of Foreman of Sewer Cleaning with the City of Chicago, Department of Sewers. Plaintiff shall be afforded seniority in that title retroactive to July 16, 1980, and shall further be afforded career service status upon said reinstatement to that position.

Thus the parties understood "seniority . . . retroactive to July 16, 1980" and "career service status" as different things. Lucille relies on the former, but only the latter is to be found in the judgment. Although Lucille contends that vacation and pension credits come with any "reinstatement," we join the district

judge in rejecting that position. Most lawyers use reinstatement to refer to a renewal of employment. Additional benefits such as back pay and fringe benefits that would have accumulated during time missed (or were lost on discharge) are negotiated and provided for separately.

The district court possessed ancillary jurisdiction to interpret and enforce its judgment; it lacked jurisdiction to interpret and enforce the contract. All we need consider, then, are the provisions of the judgment. For reasons we have covered, that judgment affords Lucille no comfort. The decision denying his petition for additional relief is therefore affirmed

AFFIRMED.

CUDAHY, Circuit Judge, concurring. I agree with much of the analysis and with the result reached by the majority opinion, but write separately with respect to one interpretation that the majority does not pursue. The majority states that "the district court's judgment in this case does not in corporate the settlement . . ." But the Judgment Order by its own terms "is entered in a accordance with the Settlement Agreement which has been signed a by all parties . . ." It is not much of a stretch to construe "entered in accordance with" as language of incorporation. In fact, in *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985), an opinion the majority describes as portending (and approved by) the Supreme Court's recent

opinion in *Kokkonen v. Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994) we held that a judgment entered "pursuant to" a settlement agreement incorporated that agreement. *Kokkonen* is silent as to what words a district court must use to incorporate a settlement agreement, and I see no reason to depart (as the majority appears to) from our approach in *McCall-Bey*.

In any event, one of Lucille's principal arguments involves interpretation of the word "reinstatement" from the settlement agreement. He says that this means he is entitled to leave and pension credits, essentially restoring his situation to what it would have been had he not been discharged. But the judgment does

say he is to be "reinstated." So it seems to me that the same argument as to the meaning of "reinstate" survives under any analysis.

Since I agree with the district court that "reinstate" was not intended to mean what Lucille claims it means, I agree that the City prevails and the district court should be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

App. 16

Chicago, Illinois 60604

United States Court of Appeals

for the Seventh Circuit

Chicago, IL 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 3, 1994

Before: Hon. Richard D. Cudahy, Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Frank H. Easterbrook, Cir. Judge

No. 94-1106

John Lucille, Plaintiff-Appellant v.

City of Chicago, an Illinois Municipal Corporation, Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 85 C 5956, John A. Nordberg, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with

the decision of this court entered on this date.

App. 19

United States Court of Appeals

for the Seventh Circuit

Chicago, IL 60604

Date: September 22, 1994

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Frank H. Easterbrook, Judge

No. 94-1106

John Lucille, Plaintiff-Appellant,

v. City of Chicago, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 85 C 5956 John A. Nordberg, Judge.

Order

Plaintiff-Appellant filed a petition for rehearing on August 15, 1994. All of the

judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION

JOHN LUCILLE, et al.,

Plaintiffs,

v. No. 85 C 5956

CITY OF CHICAGO, et al.,

Defendants.

John A. Nordberg, Judge

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff John Lucille's Amended Petition to Enforce Terms and Conditions of the Settlement Agreement.

FACTS

In June 1984, the Defendant, the City of Chicago, terminated Plaintiff from his employment with the City's Department

of Sewers. Subsequently, Plaintiff filed an action pursuant to 42 U.S.C. Sec. 1983 alleging that his termination was unlawful. On December 15, 1989, the Plaintiff and the Defendant entered into a Settlement Agreement. (Plaintiff's Memorandum; Exhibit A).

As part of the Settlement Agreement, Defendant agreed to reinstate Plaintiff to the position of Foreman of Sewer Cleaning with the City's Department of Sewers. (Exhibit A, p. 6) In the same paragraph, the Settlement Agreement stipulated that Plaintiff would be awarded full seniority in the position of Foreman of Sewer Cleaning retroactive to July 16, 1980. Id. Plaintiff also received damages in the amount of twenty-one thousand

dollars ($21,000).

In his Amended Petition, Plaintiff implies that the Defendant has violated the Settlement Agreement by not reinstating Plaintiff with full seniority and benefits. Plaintiff asserts that he is entitled to (1) accumulated vacation time, compensation time, holiday time and sick time prior to his 1984 discharge; (2) vacation time which could have been accumulated from 1984 until 1990 had he not been discharged; and (3) reimbursement in the amount of $47,725.23 which represents the sum Plaintiff withdrew from his pension fund after his discharge.

ANALYSIS

A settlement agreement is a contract and as such, "the construction

and enforcement of settlement agreements are governed by principals of local law applicable to contracts generally." *Air Line Stewards, Etc. v. Trans World Airlines*, 713 F.2d 319, 321 (7th Cir. 1983) *citing Florida Educational Association v. Atkinson*, 481 F.2d 662, 663 (5th Cir. 1973). When interpreting a contract under Illinois law, "[t]he intent of the parties to a contract must be determined with reference to the contract as a whole, not merely be reference to particular words or isolated phrases, but by reviewing each part in light of the others." *Air Line Stewards*, 713 F.2d at 321 *citing LaThorp v. Bell Federal Savings & Loan Assoc.*, 68 Ill.2d 375, 378, 370 N.E.2d 188, 191 (1977).

Addressing Plaintiff's first two requests which seek (1) accumulated vacation time, compensation time, holiday time and sick time prior to Plaintiff's 1984 discharge and (2) vacation time which could have been accumulated from 1984 until 1990 had Plaintiff not been discharged, the Court holds that the Settlement Agreement does not entitle Plaintiff to such benefits. Thus, contrary to the Plaintiff's assertions, the Defendant did not violate the terms and conditions of the Settlement Agreement by denying Plaintiff these benefits.

The Defendant does not dispute the fact that the Settlement Agreement entitles Plaintiff to reinstatement with full seniority retroactive to 1980.

(Defendant's Response at p.5.) However, the Defendant argues that the terms of the Settlement Agreement provide that Plaintiff "release, waive and forever discharge . . . all claims for salary, accumulation of vacation days, sick days and other benefits of employment which Plaintiff may have been entitled to at any time he was employed with the Defendant city and/or which could or would have accrued to him in the future had he remained employed with the Defendant City." (Plaintiff's Petition, Exhibit A, p. 3, Par. 5.)

Plaintiff counters that the parties intended the Settlement Agreement to provide for reinstatement with seniority and benefits (underscore) retroactive to 1980. Plaintiff focuses on a

letter dated November 27, 1989 from Defendant's attorney which details the settlement negotiations between the parties. (Plaintiff's Memorandum; Exhibit B.) The letter recounts that Plaintiff originally proposed reinstatement and full restoration of seniority benefits plus a lump sum payment of $20,000. Id. Defendant offered a counter-proposal of reinstatement and full restoration of seniority and benefits plus a lump sum payment of $15,000. Id. (underscore)

The Court does not find the Plaintiff's reliance on presettlement negotiation s persuasive. Once settlement negotiations are reduced to writing, they are entitled to a degree of certainty. *Cummings v. Beaton & Associates, Inc.*, 259

Ill.App.3d 287, 618 N.E.2d 292, 301 (1st Dist. 1992). "Parol negotiations are not on the same legal footing as executed, written agreements, for reasons fully embedded in . . . contract law." Id. at 302, *citing Land of Lincoln Savings & Loan v. Michigan Avenue National Bank of Chicago*, 103 Ill.App.3d 1095, 1101, 432 N.E.2d 378, 383 (1982) ("[E]vidence of prior or contemporaneous oral agreements is not admissible to vary or contradict the terms of a writing, otherwise unambiguous on its face.")

The Plaintiff does not argue and the Court does not find that the terms of the Settlement Agreement are ambiguous on their face, and thus, when interpreting the Settlement Agreement, the Court will

not consider evidence of prior written and oral settlement negotiations. In fact, the plain language of the Settlement Agreement suggests that the parties explicitly excluded provisions for benefits. Plaintiff's Memorandum; Exhibit A, p.3, Par. 5. Additionally, the Settlement Agreement states that the "Plaintiff understands and agrees that [the] Settlement Agreement is a final and total settlement" and that "the Settlement Agreement contains the entire agreement between the parties." [Plaintiff's Memorandum; Exhibit A, p.4, Par.6 and p.5, Par.10.) Given the unambiguous language of the Settlement Agreement, the Court concludes that the Defendant did not violate the terms and conditions of the Settlement

Agreement by not providing Plaintiff with the requested benefits.

Plaintiff also relies on a Minute Order issued December 10, 1990 in Busa, et al. v. Barnes, 84 C 6525, in support of his argument that he is entitled to vacation time accumulated prior to his discharge and vacation time which could have been accumulated between 1984 and 1990 if the Defendant had not discharged Plaintiff. However, contrary to Plaintiff's suggestions, Busa does not stand for the proposition that "reinstatement" with "seniority" retroactive to a specific date entitles the employee to vacation time accumulated prior to termination and to vacation time which could have been accumulated had defendant not

discharged the employee.

In Busa, the Court expressly that the defendant did not "dispute the amount of accrued vacation time to which the plaintiff's were entitled, but only the time when such accrual may be used." Busa, 84 C 6525 n.1. The Busa court rejected the defendant's contention that the employee would have to wait a year before using his accrued vacation time. Busa stands for the proposition that "reinstatement" with "seniority" retroactive to a specific date entitles the employee to immediate use of his vacation time. Since the Busa defendant apparently did not argue that the employee had waived his right to accumulated vacation time, the Busa Court only addressed the issue of

when the employee was entitled use his accumulated vacation. Thus, this Court finds that the Busa court did not address the pertinent issues regarding waiver of accumulated vacation time raised by the parties in the present case.

Finally, assessing plaintiff's claim for $47,735.23, the Court holds that the Settlement Agreement does not entitle Plaintiff to reimbursement for the sum he withdrew from his pension fund.

In support of his claim for reimbursement, Plaintiff argues that if the Defendant had not discharged him, the Plaintiff would not have had to withdraw $47,725.23 from his pension fund, the Municipal Employees' and Laborers' Annuity and Benefit Fund of Chicago. Plaintiff

states further that until he pays his pension fund he will not be eligible to receive benefits under the Early Retirement Incentive Program (ERIP). ERIP offers fund members a one-time opportunity to retire early and receive an enhanced annuity. (Defendant's Response; Exhibit B and C.)

Despite the Plaintiff's assertions, this Court holds that Defendant is not obligated to reimburse Plaintiff for the money Plaintiff withdrew from his pension fund. Once again, the Court looks to the unambiguous language of the Settlement Agreement which requires Plaintiff to release, waive and discharge the Defendant from any claim "arising out of or relating to Plaintiff's employment relationship

with the City . . . including . . . other benefits of employment which Plaintiff may have been entitled to at any time he was employed with the Defendant City and/or which could or would have accrued to him in the future had he remained employed with the Defendant City ." (Defendant's Memorandum; Exhibit A p.3).

Furthermore, the Illinois General Assembly did not enact ERIP until late 1992 or early 1993, and thus, the parties could not have contemplated providing Plaintiff with benefits pursuant to ERIP when they signed the Settlement Agreement in December, 1989. (Defendant's Memorandum; Exhibit B and C.)

Thus, to require the Defendant to reimburse Plaintiff for $47,725.23, the

sum Plaintiff withdrew from his pension fund, would clearly contravene the intent of the parties as manifested in the Settlement Agreement. The Court determines that the Defendant did not violate the terms and conditions of the Settlement Agreement when it refused to reimburse the Plaintiff for sums the Plaintiff withdrew from his pension fund.

Violation of the Shakman Decree

The Court holds that the Plaintiff has not stated a claim for violation of the 1972 Shakman decree. The Shakman consent decree prohibits a public employer from "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is already a governmen-

tal employee, upon or because of any political reason or factor." *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1358 (N.D. Ill. 1979), *vacated on other grounds*, 829 F.2d 1987 (7th Cir. 1987). Plaintiff fails to allege that he was denied benefits or early retirement because of political reasons.

CONCLUSIONS

For the foregoing reasons, the Court holds that the Defendant did not violate the Settlement Agreement. Plaintiff's Petition to enforce the Terms and Conditions of the Settlement Agreement is denied.

ENTER:

(Signed)

John A. Nordberg

United States

District Judge

DATED: December 30, 1993

Minute Order

John A. Nordberg 85 C 5956

December 30, 1993

Lucille, et al v. City of Chicago, et al

[memorandum Opinion Attached]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JOHN LUCILLE, ORVILLE JONES, AND JAMES WHITE, PLAINTIFFS,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation, et. al., Defendants

No. 85 C 05956

FINAL JUDGMENT ORDER

[Marked R92 and docketed by the District Clerk, Stuart Cunningham, on 1/18/90. Also filestamped Received by Thomas Strubbe, Clerk of the 7th Circuit Court of Appeals and marked as Exhibit 14 of John Lucille's 8/15/94 Petition for Rehearing]

This cause comes to be heard for the entry of Judgment and Final Settlement

in the above cause with all parties given notice and the Court fully advised in the premises;

1. That as the Plaintiff John Lucille has resolved his dispute with the Defendants, the City of Chicago, Charles Pounian, Eugene Barnes, William Sommerford and Lester Dickinson by way of Settlement Agreement, Judgment is hereby entered in favor of the Plaintiff, John Lucille and against the City of Chicago in the total of TWENTY ONE THOUSAND AND 00/100 DOLLARS ($21,000.000), as damages and not as back pay, and inclusive of all costs and attorneys' fees.

2. That the complaint is hereby dismissed against defendants Pounian, Barnes, Sommerford and Dickinson, with

prejudice and that the judgment is to be paid by the City of Chicago.

3. That this judgment Order is a Final Order, and is entered in accordance with the Settlement Agreement which has been signed by all parties or the authorized representatives and filed with the Court.

4. That the City's obligations pursuant to this Final Order shall be completed within sixty days of the receipt by the Defendants' counsel of a copy of the entry of the Judgment.

5. That judgment is entered against the City of Chicago and in favor of attorney Steven H. Sosman in the total amount of FOUR THOUSAND AND 00/100 (4,000.00).

6. That on or before January 16, 1990, or upon receipt by defendants' counsel of a copy of this Judgment Order, whichever occurs last, John Lucille shall be further afforded career service upon reinstatement to that position.

Dated:

January 18,, 1990

(SIGNED)

John A. Nordberg

Steven H.Sosman
Attorney for John Lucille
7 South Dearborn
Suite 1310
Chicago, Illinois 60603
641-3755